Cain next filed an application for a writ of error *coram nobis* in the Appellate Division, alleging ineffective assistance of appellate counsel. The application was dated July 10, 2001. It was accompanied by an affidavit of service indicating the date that the prosecution was served with the petition and stating that Cain placed copies in a prison mailbox addressed to the Queens County District Attorney on December 7, 2001, nearly four months after the date reflected in the application. Cain did not make any representation in the affidavit about the date he attempted to file the petition with the court. In a letter dated December 10, 2001, three days after the affidavit of service was notarized, Cain stated that he was the forwarding the *coram nobis* petition to the court. The petition was received by the court on December 17, 2001.

On April 29, 2002, the Appellate Division denied his application for a writ of error *coram nobis*. *People v. Cain*, 293 A.D.2d 755 (2d Dept. 2002). Cain sought leave to appeal to the New York Court of Appeals, which dismissed the application on May 20, 2002, because the order was not appealable under New York law at the time.

The Proceedings in Federal Court

Cain next filed an application for a writ of habeas corpus in the Eastern District of New York. The petition, received by the clerk on July 3, 2003, was undated and was not accompanied by an affidavit of service or an indication of the date it was given to prison authorities for filing with the court.

On August 30, 2002, Judge Frederic Block issued an order directing Cain to show cause why the petition should not be dismissed as time-barred. The District Court noted that Cain's conviction became final on September 18, 2000, and that his state court post-judgment motion, which pre-dated

September 18th, tolled the statute of limitations until February 5, 2001, the date the Appellate Division denied leave to appeal the denial of the motion. The court also noted that although Cain had stated that he subsequently filed a *coram nobis* petition, Cain had not indicated the date on which the application was filed in state court. The court additionally observed that Cain's attempt to appeal the denial of his *coram nobis* petition, which was dismissed by the New York Court of Appeals, was not an available avenue of review under New York law at the time the application was made, and that the application thus did not toll the statute of limitations under the Second Circuit's decision in *Hizbullahankhamon v. Walker*, 255 F.3d 65, 70 (2d Cir. 2001), *cert. denied*, 536 U.S. 925 (2002). The District Court ordered Cain to show cause why the petition should not be dismissed and directed Cain to indicate the date that he filed the *coram nobis* petition in state court, as well as any other circumstances indicating that the petition was timely filed.

On September 26, 2002, Cain filed an "affirmation" in response to the order to show cause. He conceded that the conviction became final on September 18, 2000, but claimed that he had given his state coram nobis petition to prison authorities on July 10, 2001, exactly four months before the date of his own letter forwarding the *coram nobis* application to the court and almost four months before he had the affidavit of service for the *coram nobis* petition notarized in prison. He also claimed that he had given his habeas corpus petition to prison authorities on June 26, 2002, although it was received on July 3, 2002. He concluded, based on his calculations, that he had filed his petition with either four or eleven days to spare.

Subsequently, Magistrate Judge Lois Bloom issued an order to show cause to the state requiring an answer to the petition. On February 27, 2002, the state moved to dismiss the

petition on timeliness grounds. The state maintained that tolling for the *coram nobis* petition commenced on December 17, 2001, the date it was received by the clerk of the state court. Applying the December 17th date, as opposed to the July 10th date, decreased the period of tolling and rendered the petition outside the statutory one-year period.

Cain opposed the motion, claiming once again that he had given his coram nobis petition to prison authorities on July 10, 2001. He did not, however, address the fact that the *coram nobis* petition was not notarized until December 7, 2001, or that his own letter forwarding the petition to the court was dated December 10, 2001, or that the motion was not received by the court until December 17, 2001.

Respondent filed a reply to Cain's opposition on March 27, 2003. The state argued that tolling for the *coram nobis* motion began on the date it was filed according to state law, which was upon receipt on December 17, 2001. Citing *Moore v. Gibson*, 250 F.3d 1295 (10th Cir.), *cert. denied*, 534 U.S. 1000 (2001); *Adams v. LeMaster*, 223 F.3d 1177 (10th Cir. 2000), *cert. denied*, 531 U.S. 1195 (2001), and *Coleman v. Johnson*, 184 F.3d 398 (5th Cir. 1999), *cert. denied*, 529 U.S. 1057 (2000), the state argued that the federal prison mailbox rule, which had been rejected by New York, did not apply to state court applications and that tolling did not therefore commence when Cain claimed to have given the document to prison authorities.

On April 7, 2003, the District Court dismissed the petition as time-barred (1a). The court noted that Cain offered no explanation for the discrepancy between the date typed on the *coram nobis* application, July 10, 2001, and the date it was notarized, December 7, 2001. The court held, moreover, that the *coram nobis* application was actually "filed" on December

17, 2001, the date it was received by the clerk of the Appellate Division. The court noted that "filing" under the tolling provision was governed by state law, citing the Supreme Court decision in *Artuz v. Bennett*, 531 U.S. 4 (2000), and New York law provides that a petition is filed when received. The court concluded that because more than 365 days had elapsed absent the tolling for the state court motions, Cain had failed to satisfy the statute of limitations. The District Court subsequently denied a certificate of appealability.

Cain then moved for a certificate of appealabiliy in the Second Circuit. In support of his motion, Cain, in addition to disputing the dismissal of his petition on timeliness grounds, raised only one issue with regard to the alleged denial of his constitutional rights (*see* Cain's Affidavit Supporting Request for Certificate of Appealability, dated June 13, 2003, at 4, 7-8). He argued that his co-defendant's confession was illegally obtained and that his photographic and corporeal identifications were the fruit of this illegal confession.

The panel considering the motion granted a certificate of appealability, specifying only that "the motion is granted on the issue of whether the prison mailbox rule applies to state filings that toll the AEDPA's statute of limitations" (*see* Certificate of Appealability, dated November 10, 2003). The panel did not find that Cain had made a substantial showing of the denial of any constitutional right. The Second Circuit directed that this case be heard "in tandem with" *Artuz v. Fernandez*, No. 03-2541, an interlocutory appeal by the state from the denial of a motion to dismiss that also presented the "mailbox rule" issue as applied to state filings that toll the statute of limitations.

On appeal, Cain acknowledged that the timeliness of his petition depended upon application of the federal "mailbox" rule to his state post-conviction application, and he also conceded

that there was a split of authority on this issue. He argued, however, that the federal mailbox rule applied to all state post-conviction applications for the purpose of determining the commencement of the tolling period, without regard to whether state rules concerning filing dictated a different result.

In response, the state raised a jurisdictional issue and opposed application of the federal mailbox rule to the tolling provision for state post-conviction applications. First, the state argued that the jurisdictional prerequisite to an appeal from the under 28 U.S.C. § 2253 had never been met. That statute, and this Court's decision in *Slack v. McDaniel*, 529 U.S. 473 (2000), require that a petitioner make a substantial showing of the denial of a constitutional right before an appeal can be heard, but neither the District Court nor the Second Circuit panel considering the certificate of appealability made any such finding. Because the petitioner had not made that showing, and could not make such a showing even at the time of oral argument, the Second Circuit could not entertain the appeal.

The state also urged the Second Circuit to adopt the position of those Circuits declining to follow the federal mailbox rule as to the filing of state post-conviction applications. The state pointed out that a contrary interpretation was inconsistent with the definition of filing provided by this Court in *Artuz v. Bennett*, 531 U.S. 4, *supra*, in interpreting the very same tolling provision, and that it would undermine principles of federalism and comity central to habeas corpus jurisprudence to superimpose the federal mailbox rule on states that had declined to adopt it.

In a decision dated March 17, 2005, the Second Circuit entirely failed to address the jurisdictional issue, vacated the district court's dismissal on timeliness grounds, and remanded the case to the district court for proceedings consistent with its

opinion in this case and in the companion case decided the same day, *Fernandez v. Artuz*, 402 F.3d 11 (2d Cir. 2005), *cert. pending*, Sup. Ct. Index No. 04-1540. The Second Circuit, citing to its decision in *Fernandez*, determined that the District Court should have applied the federal mailbox rule to the state post-conviction applications.

In *Fernandez*, the Second Circuit acknowledged that the federal circuit courts were divided on this issue and that local rules of New York State courts specify that a motion "shall be considered filed only upon receipt." *Id.* at 114-15. The court ruled, however, that because the state had no time limit on *coram nobis* petitions, such as filed in this case, the date of filing was irrelevant under New York law and did not render the state application "proper or improper." *Id.* at 115-16. The court offered no definition of "filing" and did not address how Congress could have intended "filing" to mean one thing with regard to state applications that included a time bar and something else with regard to other state applications.[1]

REASONS FOR GRANTING THE WRIT

This case presents two compelling issues for this Court's consideration, one that goes to the very jurisdiction of the federal circuit courts of appeals to review statute of limitations rulings in habeas corpus cases and another that has openly

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[1]The court stated that, applying the federal mailbox rule to Cain's case, it could not determine whether the petition was timely or untimely. It thus remanded the case to the District Court to determine which of three possible dates the court should use in deciding when the petition was handed to prison authorities: the date petitioner initially stated he handed the petition to prison authorities; the date of his affidavit of service on the state; or the date of his cover letter forwarding the motion to the Appellate Division.

divided the federal circuit courts. The jurisdictional question is whether a circuit court may review the denial of a writ of habeas corpus premised on timeliness grounds in the absence of the statutorily mandated substantial showing of the denial of a constitutional right. Because the Second Circuit, and some other circuit courts, routinely exercise jurisdiction over statute of limitations issues without there ever having been a finding that the jurisdictional prerequisite has been met, and because other circuit courts have adopted the opposite practice, this Court should grant review of this issue to ensure that all of the courts of appeals exercise jurisdiction only in appropriate cases.

The issue that has so openly divided the federal Circuit Courts of Appeals is whether, under the statute of limitations for habeas corpus petitions, the tolling period for state post-conviction applications commences when the application is handed to prison authorities, pursuant to the rule devised by this Court in *Houston v. Lack*, 487 U.S. 266 (1988), or when the petition would be deemed filed under state law, as suggested by this Court in *Artuz v. Bennett*, 531 U.S. 4 (2000). Most of the circuit courts have held that state rules of filing govern, but the Second Circuit has instead superimposed the *Houston* rule over the state rules. Because the circuit courts are split on this issue and because there is an important question over whether the *Houston* rule – created under much more exigent circumstances and applied only to notices of appeal in federal cases – can be extended to supercede state rules of filing concerning state post-conviction applications, this Court should grant review to resolve the issue.

I. The Second Circuit's Routine Exercise of Jurisdiction where neither that Court nor the District Courts Has Ever Determined that the Petitioner Made a Substantial Showing of the Denial of a Constitutional Right Directly Contradicts the Express Language of the Habeas Corpus Statute, as well as this Court's Decision in *Slack v. McDaniel*, 529 U.S. 473 (2000), and the Holdings and Practices of other Circuit Courts.

Section 2253 of Title 28 of the United States Code governs the taking of appeals from final orders in habeas corpus cases. It specifically provides that an appeal "may not be taken" in the absence of a certificate of appealability and that such a certificate may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." This Court, interpreting that provision, has explained that "determining whether a COA should issue where the petition was dismissed on procedural grounds has two components, one directed at the underlying constitutional claims and one directed at the District Court's procedural holding." *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). A certificate may issue only if the petitioner has shown that jurists of reason would find it debatable 1) whether the petition states a valid claim for denial of a constitutional right, and 2) whether the District Court was correct in its procedural ruling." *Id.* And, as this Court held in *Slack*, both showings are mandatory. "Section 2253 mandates that both showings be made before the court of appeals may entertain the appeal." *Id.* The statute also provides that the court must specify the issues that are deemed to satisfy the required showing.

Despite the statutory prerequisite and this Court's unambiguous language in *Slack*, the Second Circuit exercised jurisdiction in this case to review the timeliness issue, vacating the district court's dismissal, without there ever having been a

finding that petitioner satisfied the requirement of a substantial showing of the denial of a constitutional right. The district court made no such finding, as it denied a certificate of appealability entirely. And the Second Circuit panel considering the certificate of appealability made a finding only as to the procedural timeliness issue. Moreover, when the state argued to the panel deciding the appeal that the statutory jurisdictional requirement had never been met, the Second Circuit neither suggested that such a finding had been made, explicitly or implicitly, nor did it make the required finding itself.

In the absence of any finding by any court regarding any showing of the denial of a constitutional right, the Second Circuit could not entertain the appeal. Nevertheless, that court vacated the district court's dismissal of the petition, pointedly ignoring both the statute's unambiguous requirement and this Court's mandate in *Slack*. This exercise of jurisdiction in clear contravention of the prerequisites for entertaining an appeal would be reason alone to grant certiorari and summarily reverse the decision of the Second Circuit.

But this issue has much more far-reaching effects than this case alone. In fact, it is common practice for courts in the Second Circuit to grant certificates of appealability on timeliness issues without those courts ever considering *Slack*'s second prong. *See, e.g., Bond v. Walsh*, 2002 U.S. Dist. Lexis 4826 (E.D.N.Y. February 12, 2002) (district court grants certificate of appealability on timeliness issue alone without considering constitutional showing), *dismissal vacated*, 53 Fed. Appx. 162 (2d Cir. 2002) (court exercised jurisdiction over appeal by reviewing timeliness issue and vacating dismissal); *Baldayaque v. United States*, 2002 U.S. Dist. Lexis 17652 (D. Conn. 2002) (district court issued certificate of appealibility on timeliness issue only, without considering necessity of second showing), *dismissal vacated*, 338 F.3d 145 (2d Cir. 2003)(court exercised

jurisdiction by disagreeing with timeliness determination and vacating dismissal); *Harrison v. Artuz*, 105 F.Supp. 2d 101 (ENDY 2000), *aff'd sub nom. Clark v. Barkley*, 51 Fed. App. 332 (2d Cir. 2002) (exercising jurisdiction over appeal by agreeing with timeliness determination and affirming district court judgment); *see also Brigian v. Artuz*, 37 Fed. Appx. 559 (2002) (district court granted certificate considering timeliness issue only; Second Circuit affirmed on appeal).

Nor is this practice confined to the Second Circuit. Other circuit courts of appeals also appear to exercise jurisdiction frequently in the absence of the requisite showing. *Walker v. Warden*, 125 Fed. Appx. 568 (5th Cir. 2005) (specifically noting that it was not deciding whether substantial showing requirement had been met, but nevertheless granting COA, vacating and remanding on timeliness issue); *Franklin v. Dretke*, 106 Fed Appx 926 (5th Cir. 2004) (finding error on timeliness grounds only, granting COA, and vacating); *Day v. Crosby*, 391 F.3d 1192, 1193 (11th Cir. 2004) (certificate of appealabililty on timeliness issue only, no finding regarding merits; affirmed on timeliness issue); *Walker v. Crosby*, 341 F.3d 1240, 1242 (11th Cir. 2003) (same, but reversed on timeliness issue); *Wampler v. Mills*, 60 Fed. Appx. 594 (6th Cir. 2003) (same).

By contrast, other circuits have adopted the correct practice in determining jurisdiction on these appeals from dismissals on timeliness grounds. *Edgington v. Hinsely*, 115 Fed. Appx. 879 (7th Cir. 2004) (COA originally granted on timeliness issue vacated for lack of substantial showing of denial of constitutional right); *United States v. Ponds*, 111 Fed. Appx. 689 (4th Cir 2004) (finding district court erred in timeliness determination, but denying COA because no showing of denial of constitutional right); *Kirkland v. Clark*, 2000 U.S. App. Lexis 33662 (4th Cir. 2000)(denying COA despite finding that district

court wrong on timeliness issue, because petitioner failed to make substantial showing on constitutional issue); *Adams v. LeMaster*, 223 F.3d 1177, 1179-80 (10th Cir. 2000) (noting correct standard and reviewing record to determine whether valid constitutional claim had been stated). This not only belies any claim that adherence to the statute is not feasible, it demonstrates that certiorari should be granted to determine which of the conflicting practices is correct.

Indeed, timely resolution of this issue is critical no matter what this Court eventually decides. If, as *Slack* states, a showing regarding the merits is necessary to appeal a timeliness issue, then many petitioners are obtaining review of their claims in instances where it is not appropriate; they may, for example, have even failed to allege any constitutional claim at all in their petitions, much less a valid constitutional claim. If, on the other hand, no showing is required, then petitioners in the circuits requiring such a showing are being deprived of appeals on timeliness questions when appeals should be granted because the timeliness issues are debatable. Only this Court has the power to bring uniformity to the circuit court's exercise of appellate jurisdiction over timeliness dismissals, and only this Court can ensure that those litigants deserving of review, and only those litigants, obtain it.

Moreover, the far-reaching effects of a decision on this issue can be seen on another scale as well. A ruling on the jurisdictional requirements for an appeal under section 2253 would not only affect virtually every case in which a district court dismisses the habeas corpus petition of a state prisoner on timeliness grounds, it would also apply to timeliness dismissals of virtually all federal prisoners seeking relief under section 2255, which is also subject to section 2253's jurisdictional requirements. Because so many cases fall into these categories,

this Court should grant review to ensure that all of these applications are decided using the correct standard.

Nor can respondent Cain plausibly maintain, as he did in the lower court, that the issue raised here has a faulty premise because the Second Circuit panel granting the certificate of appealability in this case must have implicitly held that there had been a substantial showing of the denial of a constitutional right. This argument amounts to nothing more than speculation. There is not a shred of evidence in the decision of the panel suggesting any such consideration, any more than there is in the district court decision. Moreover, had the panel made such a finding, it would have been required by the statute to set forth what that issue was. *See* 28 U.S.C. § 2253(c)(3). In the absence of any suggestion that such a merits determination was made in granting the certificate of appealability, it must be presumed that the panel did not find any substantial issue.

More important, when the Second Circuit was expressly confronted with the jurisdictional issue in this case, that court did not suggest that there was, or must have been, an implicit finding on this issue in granting the COA. Similarly, the court did not take respondent up on his suggestion that the court find such a constitutional issue when deciding the appeal, so at to validate the grant of the certificate. Indeed, the requisite finding has simply never been made, not in the district court, not by the panel considering the certificate of appealability, and not by the panel deciding the appeal.

This Court, then, should grant review of this issue for several reasons: because the Second Circuit exercised jurisdiction over the appeal without any authority to do so and in direct contravention of the statute and this Court's unambiguous precedent; because the Second Circuit and other circuit courts routinely exercise jurisdiction to hear appeals on

timeliness questions without the authority to do so; and because only this Court can reconcile the varying practices of the circuit courts and ensure that appeals from timeliness dismissals are taken only when authorized. Both the jurisdictional nature of the issue and the widespread effect that a decision would have compel review in this case.

II. The Circuit Courts Are Divided Over the Important Issue of whether the Federal Mailbox Rule of *Houston v. Lack*, 487 U.S. 266 (1988), Should Be Extended to State Court Filings for the Purposes of Determining Tolling under the Habeas Corpus Statute of Limitations.

The second issue presented by this case is equally compelling, both because it has openly divided the circuit courts of appeals and because it allows this Court to address the unwarranted expansion of a federal doctrine that it has not addressed in seventeen years. As the Second Circuit itself noted in deciding the companion matter to this case, *Fernandez v. Artuz*, 402 F.3d at 114-15, there is a split of authority over whether the statutory tolling period for state post-conviction applications begins when the state petition is deemed filed under state law or, applying the federal "mailbox rule," when the state petition is handed to prison authorities. This Court should grant review in this case to resolve this conflict, and to address whether the mailbox rule – conceived by this Court under much more exigent circumstances than those present here – can legitimately be extended to apply to filings over which the state has unquestioned authority.

At least five federal circuit courts of appeals have addressed whether the federal mailbox rule applies to toll the statute of limitations for state post-conviction applications or whether state filing rules apply. The Tenth Circuit, for example, held in *Adams v. LeMaster*, 223 F.3d 1177 (10th Cir. 2000), that

state rules should govern the determination of when a state application will be deemed properly filed. The court noted that it had applied the federal mailbox rule to many different types of federal filings, but refused to extend it to state applications due to the "'high degree of respect' and 'deference' the [AEDPA] affords state courts." *Id.* at 1181. The court also relied on this Court's decision in *Artuz v. Bennett*, 531 U.S. 4, interpreting the very same provision of the AEDPA. In that case, this Court defined filing as occurring when a document is "delivered to, and accepted by, the appropriate court officer for placement into the official record," and "proper" filing as occurring when delivery and acceptance are in compliance with "the applicable state laws and rules governing filing." *Id.* at 8. In addition, the Tenth Circuit held that it did not matter that the state in that case imposed no time limits on the particular state motion in issue, noting that the interpretation of the statute must apply uniformly, and that, in fact, in the absence of any state filing deadline, the compelling circumstances supporting the mailbox rule – the imminent preclusion of review of the state-court motion – did not exist. 223 F.3d at 1181 n.3 , 1183 Since *LeMaster* was decided, the Tenth Circuit has repeatedly adhered to that rule. *See Garcia v. Shanks*, 351 F.3d 468, 472 (10th Cir. 2003) (adhering to same rule post-*Bennett*); *Burger v. Scott*, 317 F.3d 1133, 1140-41 (10th Cir. 2003).

In *Coleman v. Johnson*, 184 F.3d 398 (5th Cir. 1999), *cert. denied*, 529 U.S. 1057 (2000), the Fifth Circuit came to the same conclusion. Noting that it had previously applied the mailbox rule to many federal filing statutes, the court nevertheless found that the extension of the rule advocated by the petitioner was not warranted. The court held that comity considerations prevented the court from superimposing the federal mailbox rule on the tolling provision, and decided that the concerns identified in *Houston* could be addressed by equitable tolling.

And in *Vroman v. Brigano*, 346 F.3d 598 (6th Cir. 2003), the Sixth Circuit followed suit. In that case, the court rejected application of the federal mailbox rule to a state post-conviction application, finding that it did not sufficiently toll the limitations period to render the petition timely. The Court noted that state filing rules judged filing by receipt and that federal courts were bound to accept state-court determinations in that respect.

By contrast, in *Anthony v. Cambra*, 236 F.3d 568 (9th Cir. 2000), the Ninth Circuit, in interpreting the tolling provision, stated, "we [have] squarely held that the mailbox rule applies with equal force to the filing of state as well as federal petitions." The Court, however, did not address how its view squared with this Court's decision in *Bennett*, or how "filing" could be determined by federal law while "proper filing" would be determined by state law.

And the Second Circuit in this case and *Fernandez*, the companion case, applied the federal mailbox rule to determine when state applications were filed. The court first noted that it had extended *Houston*'s mailbox rule to many different types of federal filings. 402 F.3d at 113-14. The court then reasoned that because the state imposed no time limits on the filing of state petitions, "the date of filing does not render it proper or improper." *Id.* at 116. The court also held that, for the same reason, the New York courts would never decide whether the prison mailbox rule would apply to these prisoners. The court also reasoned that application of the mailbox rule to the tolling provision could never implicate principles of comity because the state proceedings were already concluded by the time the federal proceedings commenced. *Id.* at 115 n.3.

The Second Circuit's decisions in *Fernandez* and this case placed that court squarely in conflict with the other circuit

courts. The Fifth Circuit similarly acknowledged that it had extended the mailbox rule to many different types of federal filings, but held that the extension to state court proceedings was unwarranted. The Tenth Circuit also considered a state application as to which no time limit existed, but still chose to follow state filing rules. That court also felt perfectly capable of discerning a state filing rule in the absence of a specific state time limit, in contrast to the Second Circuit's purported inability to make such a determination absent a state time bar. And the Tenth Circuit, like the Fifth and the Sixth Circuits, ruled that comity concerns were paramount even though the state proceedings had been concluded.

Not only should this Court grant review to resolve this direct and openly acknowledged conflict, it should do so because this case presents an opportunity to address the expansion of the *Houston* rule so far beyond the reasons for its inception. In *Houston*, this Court addressed a situation in which the petitioner had been denied his right to appeal because, although he had given his notice of appeal to prison authorities within the short 30-day time period required for such filings under federal law, it had not been received by the clerk until one day after the 30-day period. Absent a timely filing of the notice of appeal, the Court of Appeals was deprived of jurisdiction to hear the appeal at all. Because the petitioner had given the notice of appeal to prison authorities with several days to spare, and he had no further control over its delivery, this Court, interpreting the Federal Rules of Appellate Procedure, held that the notice of appeal should be deemed filed when given to prison authorities.

These harsh effects, jurisdictionally ending the petitioner's case forever for failure to comply with a short deadline, are not repeated in this context. First, petitioners have a full year to comply with the statute of limitations, and a

routine delay of a few days that can easily be anticipated, much like other routine prison delays incorporated within the one-year limitations period, will rarely have the impact that the four-day delay had in *Houston*. Second, for any truly significant delays caused by prison authorities, an additional mechanism exists in this context that was not available in *Houston*: equitable tolling. This mechanism is designed specifically for unusual delays occasioned by the state that operate to deprive a petitioner of his ability to satisfy the statute of limitations.

Thus, the concerns that were so compelling in the *Houston* context as to cause the court to devise a special rule of equity do not exist in the context of tolling for state post-conviction applications. Ordinary delays in the handling of mail by prison authorities require no special consideration, and the federal courts have ample means to address excessive delays that are truly caused by correction officials.

By contrast, there are considerable costs imposed when the mailbox rule is adopted. Indeed, time has proven that application of the mailbox rule is a factually complex matter that often does not admit of easy resolution, particularly in this context. In many cases, petitioners file their state post-conviction applications with no representation concerning when the filings were given to prison authorities. Many applications are undated, and many others back-dated. And, when asked directly, many prisoners eagerly misrepresent the relevant facts. Indeed, petitioner here claimed that his application was given to prison authorities on July 10, 2001, when in fact he could not have filed it until fully four months later.[2] *See also Edgar Velez*

[2] Even petitioner's affidavit of service – something frequently neglected by state prisoners – did not accurately reflect the date the *coram nobis* petition was given to prison authorities. The affidavit of service reflected that documents were forwarded to the District

v. Walker, No. 02-CV-1732 (E.D.N.Y. February 5, 2003), *adopted*, No. 02-CV-1731 (E.D.N.Y. March 27, 2003) (petitioner misrepresented date he handed petition to prison authorities by seven months); *Darryl Gadson v. M. McGinnis*, 99-CV-3624 (E.D.N.Y. April 22, 2002) (declining to accept petitioner's representation that he had filed habeas petition earlier but it had been returned). Nor do prison authorities in New York create logs of every piece of mail that leaves the prison. Indeed, New York prisons are under an obligation to deposit mail with the post office within one day of when it is collected, *see* New York Department of Corrections Directive No. 4442, dated May 8, 2002, Part III (F), and could not possibly accurately log every piece of mail in this short time span. Moreover, prisoners often send so many filings and letters to the courts that any tracking system could not reliably indicate what motion or paper was sent to the state court on a particular day. All of these factors contribute to factual disputes that are often difficult to resolve definitively, and force courts into the position of having to simply assume that a petition is given to prison authorities on the date it is signed, *see Washington v. United States*, 243 F.3d 1299, 1301(11th Cir. 2001); *Marsh v. Soares*, 223 F.3d 1217, 1218 n.1 (10th Cir. 2000), *cert. denied*, 531 U.S. 1194 (2001); *Rhodes v. Senkowski*, 82 F.Supp.2d 160, 165 (S.D.N.Y. 2000). This is a routinely incorrect conclusion, as this case itself illustrates.

Furthermore, this difficulty in determining the date that a document is given to prison authorities would be multiplied many times under the Second and Ninth Circuit's rule. Prisoners routinely file numerous state post-conviction applications, often extending over a period of years. Each of

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Attorney's Office on December 7, 2001, while petitioner's cover letter to the court filing the *coram nobis* petition is dated December 10, 2001.

these would require either a factual investigation of the evidence concerning the date the document was delivered to prison authorities or an abdication to prisoners' routinely false or mistaken representations. The process is all the more difficult because the factual inquiry must reach backwards over a period of several years. Thus, unlike when a prisoner files a habeas petition in federal court, and the state can promptly investigate the date it was handed to prison authorities, prior state petitions filed years before require investigations that, if they are possible at all, require sifting through volumes of stale records.

This process allows all too readily not only multiple additional delays, but also substantial inaccuracies, to invade the process. The ability to determine confidently and definitively precisely what periods are subject to tolling is virtually lost, and the uncertainty cannot help but undermine the finality that the statute of limitations otherwise advances. Moreover, the rule advocated by the Second and Ninth circuits allows fraud and misrepresentation on the part of prisoners to play too regular a role in the determination of tolling. And the ability on the part of prisoners to backdate their filings, usually with impunity, undermines the seriousness with which they take the strictures of the statute.

By contrast, receipt can almost always be quickly established. Almost all courts, and certainly all in New York, stamp legal mail when it is received. This stamp is immediately evident, and where any dispute exists, that dispute can be promptly and definitively resolved. Moreover, all prisoners need to do under New York law to obtain a definitive date on which a particular document is deemed filed is to include a stamped self-addressed post-card with the filing in order to obtain a receipt. *See* 22 N.Y.C.R.R. § 600.2(a)(6). Thus, in the place of lengthy investigations based on sparse and ill-kept stale records are quickly resolved disputes. This certainty advances

both the ease of application of the statute of limitations and the finality that the statute engenders.

But the Second Circuit considered none of these subtleties. It did not weigh the need for the rule against the costs, and instead simply assumed that the mailbox rule must presumptively be applied to all prisoners in the absence of a compelling independent reason precluding application of the rule. Because this Court has not addressed the *Houston* rationale in seventeen years, has not stated when the extension of the *Houston* rationale is appropriate or what circumstances must be weighed, and has certainly never countenanced the rule's application to state-court filings in any sense, it should now grant review to consider those questions.

Moreover, even assuming, as did the Second Circuit, that the mailbox rule should presumptively be applied to all prisoner filings of any nature, the Second Circuit's reasoning was still not adequate to resolve the important issue presented. The Second Circuit rested its adoption of the mailbox rule on the fact that the New York state petitions had no filing deadline, that no state rule concerning the time when these petitions were deemed filed was discernible, and that no true comity interest could be implicated because the state proceedings had concluded. This reasoning is flawed for many reasons. First, even though the particular post-conviction applications at issue were not subject to time-bars, many post-conviction applications are in fact time-limited, both inside and outside New York State. In New York, for example, time limitations exist for filing applications for leave to appeal post-conviction motions, petitions for writs of prohibition or mandamus under Article 78 of the Civil Practice Law and Rules, and applications to file late notices of appeal. Thus, wholesale adoption of the mailbox rule cannot be justified on the ground that a few applications do not

involve time limitations. This is, in fact, precisely what the Tenth Circuit observed in *LeMaster*.

Second, as the Tenth Circuit also observed in *LeMaster*, the absence of a state filing deadline, if anything, *undermines* the *Houston* rationale. The state prisoner need not fear imminent preclusion if his state petition is late, and can make whatever adjustment is necessary before filing his federal petition. Thus, the exigency present in *Houston* simply does not exist.

Third, the fact that the state petitions were not subject to a time bar may be significant to determine whether the state application was "properly" filed, and therefore whether it would receive any tolling, but it does not determine *when* an otherwise "proper" petition should be deemed filed. Put another way, whether a petition is ultimately determined to be "properly filed" in a given case does not determine when filing should be deemed to commence. After all, as this Court recently held in *Pace v. DiGuglielmo*, 125 S.Ct. 1807 (2005), if the petition exceeded a state time limitation and it was therefore not properly filed, no tolling would be afforded; thus, the question of the date tolling commences would not arise at all. Accordingly, contrary to the Second Circuit's assumption, the state's failure to rely on a time bar is simply not dispositive of the question before the court.

Fourth, the Second Circuit contradicted itself when it suggested that the state has no rule determining the time of filing. Indeed, as the Second Circuit itself acknowledged in *Fernandez*, state rules specify that a motion "shall be considered filed only upon receipt." N.Y.C.R.R. § 600.2(a)(6). And the Court rules of the New York State Appellate Division, Second Department, where Cain's state applications were filed, recite that all "motions, affirmations, and other papers will be deemed filed in this court only as of the time they are actually received

by the clerk." N.Y.C.R.R. § 670.2(d). These are more than sufficient expressions of the state's filing rules.

Fifth, to the extent that the Second Circuit is suggesting that it would apply the mailbox rule solely for applications that do not implicate a time bar and would apply state rules for those that do, the court fails to explain how Congress could have intended for the same word, "filing," to have two such different meanings simultaneously: a federal one in the first context and a state one in the second. Certainly, nothing in the text of the statute suggests such dual meanings, and the court does not explain why the very same language in the same statute should be given such opposite interpretations. *See Barnhart v. Walton*, 535 U.S. 212 (2002) (requiring explanation of "why we should interpret the same statutory words differently in closely related contexts").

Finally, the Second Circuit is wrong in assuming that no comity concerns exist because the state proceedings have been concluded. When a federal court undoes an otherwise final state conviction, respect for state processes is necessarily undermined. This is so even if the state itself leaves open the possibility that a defendant might be able to convince the state court to alter the conviction. Federal review is intrusive whether the state wishes to afford a petitioner further state review or not.

Furthermore, the use of a federal mailbox rule for state filings under the tolling provision would also offend comity in a manner that directly prejudices the state in more concrete ways. When a state declines to adopt the mailbox rule, as New York has done and as any state is perfectly free to do, it does not adopt procedures necessary to deal with the unique problems presented by the mailbox rule, as have the federal courts. The federal courts have, for example, adopted Federal Rule of

Appellate Procedure 4(c), which requires prisoners to file an affidavit regarding the date they handed their papers to prison authorities. This at least minimally provides some assurance regarding the date filings are given to prison authorities, although even then prisoners serving lengthy sentences are often not deterred from lying. States like New York that do not follow the mailbox rule have no such special provisions, of course. These states have few defenses against rampant backdating or other falsities perpetrated by petitioners. Indeed, the states cannot even defend against what would be the equally pervasive problem of faulty memories of prisoners trying to guess, months or years after the fact, the dates on which they handed their prior state applications to prison authorities. Moreover, requiring non-mailbox rule states to adopt procedures to address the unique problems presented by the mailbox rule would indeed offend fundamental principles of comity. Under any understanding of that principle, federal courts would be precluded from requiring states to enact state rules that are consistent with, and deal with the adverse affects of, a rule the states have expressly and justifiably chosen not to adopt with regard to their own state proceedings.

This Court, then, should grant review to resolve the circuit split on this issue, to determine the extent to which, and the circumstances under which, the federal mailbox rule can be extended beyond the circumstances giving rise to its inception, and, more specifically, to decide whether such an extension is warranted here, where substantial state interests are at stake.

CONCLUSION

This Court should grant certiorari to determine whether the circuit courts of appeals are correctly exercising jurisdiction to review appeals from dismissals on statute of limitations grounds and to determine whether, or under what circumstances, the federal mailbox rule can be extended beyond the circumstances of its inception to the filing of state court post-conviction applications.

Respectfully submitted,

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